

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION**

## **ORDER ADOPTING REPORT AND RECOMMENDATION**

Case No. 1:09-cv-017

North Dakota Public Service Commission; )  
Kevin Cramer, Tony Clark, and Brian Kalk, )  
in their official capacities as Commissioners )  
of the North Dakota Public Service )  
Commission; and Missouri Valley )  
Communications, Inc., )  
Defendants. )

On April 8, 2009, the plaintiff, Midcontinent Communications, filed a complaint in which it alleged violations of 47 U.S.C. § 251. See Docket No. 1. Midcontinent Communications seeks a declaration that the North Dakota Public Service Commission’s “Rural Exemption Order,” issued on October 8, 2008, is invalid under federal law. On June 1, 2009 and June 12, 2009, defendant Missouri Valley Communications, Inc. and defendant North Dakota Public Service Commission filed motions to dismiss under Rules 12(b) and 56 of the Federal Rules of Civil Procedure. See Docket Nos. 8 and 19. Both Missouri Valley Communications and the North Dakota Public Service Commission argued that the Plaintiff’s relief cannot be granted because the claim is precluded by prior adjudication before the North Dakota Public Service Commission; the Plaintiff did not timely appeal the North Dakota Public Service Commission’s decision to the state district court, the appellate authority for the North Dakota Public Service Commission; and 47 U.S.C. § 251 does not raise a federal question.

Magistrate Judge Charles S. Miller, Jr. conducted a review of the record and relevant case law and submitted a Report and Recommendation on September 30, 2009. See Docket No. 46. Judge Miller recommended that Missouri Valley Communications' and the North Dakota Public Service Commission's motions to dismiss be denied. The parties were given ten (10) days to file objections to the Report and Recommendation. None of the parties filed an objection.

The Court has carefully reviewed the Report and Recommendation, relevant case law, and the entire record and finds the Report and Recommendation to be persuasive. Accordingly, the Court **ADOPTS** the Report and Recommendation (Docket No. 46) in its entirety and **DENIES** Missouri Valley Communications' and the North Dakota Public Service Commission's motions to dismiss (Docket Nos. 8 and 19).

**IT IS SO ORDERED.**

Dated this 3rd day of November, 2009.

*/s/ Daniel L. Hovland*

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Daniel L. Hovland, District Judge  
United States District Court